

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF AMERICA CORP.
SECURITIES, DERIVATIVE AND
EMPLOYMENT RETIREMENT INCOME
SECURITY ACT (ERISA) LITIGATION

THIS DOCUMENT RELATES TO: _____ :

OPINION

STEVEN SKLAR,

Plaintiff, : No. 09 Civ. 580 (DC)

- against -

BANK OF AMERICA CORP. et al., :
:

Defendants. : :

AND RELATED CASES

CHIN, District Judge

Before this Court are thirty cases relating to the merger of Bank of America Corporation ("BofA") with Merrill Lynch & Co., Inc. ("Merrill Lynch") and public disclosures made in connection with the transaction. These putative class actions include: (1) actions based on alleged violations of the securities laws, including Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rules 10b-5 and 14a-9 thereunder, respectively (the "securities

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actions");¹ (2) derivative actions alleging violations of common law fiduciary duties and Section 14 of the Exchange Act (the "derivative actions");² and (3) actions asserting claims under the Employee Retirement Income and Security Act ("ERISA") on behalf of participants in the BofA 401(k) plan that held investments in BofA stock (the "ERISA actions").³

Motions have been made pursuant to Rule 42(a) of the Federal Rules of Civil Procedure for the consolidation of the

¹ The securities actions include: Sklar v. Bank of America Corp., No. 09 Civ. 580; Finger Interests Number One, Ltd. v. Bank of America Corp., No. 09 Civ. 606; Fort Worth Employees' Retirement Fund v. Bank of America Corp., No. 09 Civ. 638; Palumbo v. Bank of America Corp., No. 09 Civ. 740; Zitner v. Bank of America Corp., No. 09 Civ. 881; Stabbert v. Bank of America Corp., No. 09 Civ. 928; Welikson v. Bank of America Corp., No. 09 Civ. 1463; West Palm Beach Firefighters' Pension Fund v. Bank of America Corp., No. 09 Civ. 1612; Fauerbach v. Bank of America, No. 09 Civ. 1941; and Raphael v. Bank of America Corp., No. 09 Civ. 2350. Two additional actions were transferred to this Court on June 10, 2009 for coordinated or consolidated pretrial proceedings by the Panel on Multidistrict Litigation: Cromier v. Bank of America Corp., No. 09 Civ. 5410 and Bahnmaier v. Bank of America Corp., No. 09 Civ. 5411. (See Transfer Order).

² The derivative actions include: Louisiana Municipal Police Employees Retirement System v. Lewis, No. 09 Civ. 808; Waldman v. Lewis, No. 09 Civ. 834; Hollywood Police Officers' Retirement System v. Lewis, No. 09 Civ. 1174; Siegel v. Lewis, No. 09 Civ. 1331; Smith v. Lewis, No. 09 Civ. 1333; Lehmann v. Lewis, No. 09 Civ. 1434; Young v. Lewis, No. 09 Civ. 1561; Anderson v. Lewis, No. 09 Civ. 1572; West Palm Beach Firefighters Pension Fund v. Lewis, No. 09 Civ. 2581; and Westmoreland County Employee Retirement System v. Lewis, No. 09 Civ. 2609.

³ The ERISA actions include: Dailey v. Bank of America Corp., No. 09 Civ. 851; Wilson v. Bank of America Corp., No. 09 Civ. 880; Adams v. Bank of America Corp., No. 09 Civ. 914; Wright v. Bank of America Corp., No. 09 Civ. 1056; Stricker v. Bank of America Corp. Corporate Benefits Committee, No. 09 Civ. 1177; Gilliam v. Bank of America Corp., No. 09 Civ. 1606; Alvarez v. Bank of America Corp., No. 09 Civ. 2389; and Calibuso v. Bank of America Corp., No. 09 Civ. 2674.

cases into three consolidated actions: securities actions; derivative actions; and ERISA actions. Motions have also been made for the appointment of lead plaintiff and lead counsel in each of the three sets of actions, pursuant to 15 U.S.C. § 78u-4(a) (3) (B) and Fed. R. Civ. P. 23.

For the reasons set forth below, the securities actions are consolidated, the group known as the Public Pension Funds is appointed lead plaintiff in the securities actions, and its choice for lead counsel is approved. The derivative actions are also consolidated, the group known as the Institutional Group is appointed interim lead plaintiff, and its attorneys Kahn Swick & Foti ("KSF")⁴ and Saxena White P.A. ("Saxena White") are appointed interim co-lead counsel. Finally, the ERISA actions are also consolidated and the law firms of Harwood Feffer LLP ("Harwood Feffer"), Squitieri & Fearon, LLP ("Squitieri & Fearon"), and Hagens Berman Sobol Shapiro LLP ("Hagens Berman") are appointed interim co-lead counsel. All other motions pending before the Court related to these actions are denied.

BACKGROUND

A. The Facts

All the actions arise from BofA's recent merger with Merrill Lynch and allege the same core set of facts.

On September 15, 2008, BofA announced an agreement (the "Agreement") to merge with Merrill Lynch in a \$50 billion all

⁴ Kahn Swick & Foti was formerly known as Kahn Gauthier & Swick, LLC.

stock transaction (the "Merger"). Discussions between BofA and Merrill Lynch about the Merger had commenced only a short while before the Agreement was announced. The terms of the Merger were set forth in a Joint Proxy Statement (the "Proxy Statement") filed with the U.S. Securities and Exchange Commission (the "SEC") on November 3, 2008, and mailed to all BofA shareholders of record as of October 10, 2008. The Proxy Statement incorporated by reference documents filed by BofA and Merrill Lynch with the SEC, including Quarterly Reports on Form 10-Q and Current Reports on Form 8-K. The Proxy Statement (and documents incorporated by reference) are alleged to have understated, concealed, or otherwise failed to disclose Merrill Lynch's true financial condition.

BofA shareholders approved the Merger following a vote held December 5, 2008. Pursuant to the terms of the Agreement, Merrill Lynch shareholders would receive 0.8595 shares of BofA stock for each of their shares, representing a value of approximately \$29 per Merrill Lynch share. The transaction closed on January 1, 2009. Before the transaction closed, however, BofA officers and directors are alleged to have learned about Merrill Lynch's heavy 2008 losses and the deterioration of its financial condition, but failed to disclose such information or supplement or amend the Proxy Statement. BofA and Merrill Lynch officers and directors are also alleged to have paid themselves substantial bonuses. BofA required additional funding and financial guarantees from federal government officials to complete its acquisition of Merrill Lynch.

Facts regarding Merrill Lynch's dire financial condition began to emerge in January 2009. Following these disclosures, the market price of BofA common stock fell to \$5.10 per share as of January 20, 2009, a decline of 50 percent from the prior week.

B. The Securities Actions

The securities actions assert two primary legal claims: (1) violations of Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a), and (2) violations of Sections 10(b) of the Exchange Act, 15 U.S.C. § 78j(b).⁵

Plaintiffs' claims under Section 14(a) are brought on behalf of persons who owned BofA shares on the October 10, 2008 record date and were entitled to vote on the Merger. Plaintiffs allege that the Proxy Statement setting forth the terms of the Merger "contained material misrepresentations and omitted to disclose true facts relevant to the Merger," including material facts about Merrill's business, financial condition, and the substantial risks associated with Merrill's assets. (Sklar Compl. ¶¶ 2, 49).

The Section 10(b) claims are brought on behalf of persons who purchased or otherwise acquired BofA stock during the alleged class period. Plaintiffs allege that BofA and its officers made false and/or misleading statements about the financial health of BofA and Merrill, such that class members paid artificially inflated prices for BofA common stock.

⁵ Some actions allege claims under only Section 14(a) or Section 10(b); others allege claims under both statutes.

C. The Derivative Actions

The derivative actions are brought under Federal Rule of Civil Procedure 23.1 on behalf of BofA. Some of them are also brought derivatively on behalf of Merrill Lynch. The actions name BofA officers and directors as defendants; some also name as defendants Merrill Lynch officers and directors and financial services firms who provided advisory services related to the merger. Defendants are alleged to have breached their fiduciary duties to their respective company and/or aided and abetted one another in breaching their fiduciary duties. Plaintiffs also bring related common law claims for, inter alia, unjust enrichment and waste of corporate assets, as well as claims under Sections 14(a) and 10(b) of the Exchange Act.

D. The ERISA Actions

The ERISA actions are brought pursuant to Section 502 of ERISA, 29 U.S.C. § 1132, against fiduciaries of the BofA 401(k) Plan (the "Plan"), which covers all BofA and BofA subsidiary employees. Plaintiffs allege that the Plan's fiduciaries invested in BofA common stock, even though they knew or should have known that the financial health of BofA was at serious risk due to its acquisition of Merrill Lynch and its January 2008 acquisition of the fast-deteriorating Countrywide Financial Corporation. Plaintiffs bring claims for breach of various fiduciary duties under ERISA Sections 404 and 405.

Plaintiff Judy Calibuso also raises claims under Sections 404 and 405 related to BofA's Pension Plan. Pension

Plan benefits are based on a hypothetical account tied, in part, to hypothetical "investment credits." Participants determine how to invest their hypothetical investment credits. Calibuso alleges that BofA has a conflict of interest with respect to the Pension Plan because its funding obligation depends on participants' selection of hypothetical investments. She also claims that Pension Plan fiduciaries have a "heightened duty" -- which they breached -- to ensure the Pension Plan offered "prudent hypothetical investment options." (Calibuso Compl. ¶¶ 50-60).

DISCUSSION

A. Consolidation

Consolidation is appropriate where there are actions involving "common question[s] of law or fact" pending before the Court. See Fed. R. Civ. P. 42(a).

Here, separate consolidation of the securities actions, derivative actions, and ERISA actions is appropriate. Defendants and movant plaintiffs all seek consolidation, and no opposition to consolidation has been received. Within each of the three sets of cases, the cases involve common questions of law and fact sufficient to warrant consolidation. Judicial convenience and economy will be promoted by consolidation; it will also avoid unnecessary costs to the parties. See Johnson v. Celotex Corp., 899 F. 2d 1281, 1284-85 (2d Cir. 1990); In re Bear Stearns Cos., Sec., Derivative, & Employee Ret. Income Sec. Act (ERISA) Litig., No. 08 MDL 1963 (RWS), 2009 WL 50132, at *4 (S.D.N.Y. Jan. 5,

2009). Though the different cases within each set of cases are not identical, "[d]ifferences in causes of action, defendants, or the class period do not render consolidation inappropriate if the cases present sufficiently common questions of fact and law, and the differences do not outweigh the interests of judicial economy served by consolidation." Kaplan v. Gelfond, 240 F.R.D. 88, 91 (S.D.N.Y. 2007). Accordingly, the securities actions, the derivative actions, and the ERISA actions will be consolidated into three separately consolidated cases. Future cases raising common questions of law and fact filed in this Court or transferred to this Court will also be consolidated into the appropriate consolidated case.

B. Lead Plaintiff and Lead Counsel In The Securities Actions

1. Applicable Law

The Private Securities Litigation Reform Act of 1995 (the "PSLRA") requires the court to appoint a "lead plaintiff" in private securities class actions who is "the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." 15 U.S.C. § 78u-4(a)(3)(B)(i). This provision of the PSLRA was intended to ensure that parties with "significant financial interests in the litigation" would oversee securities class actions and control the management of such suits, including the selection of counsel. In re McDermott Int'l Sec. Litig., No. 08 Civ. 9943 (DC), 2009 WL 579502, at *1 (S.D.N.Y. Mar. 6, 2009).

Determination of the "most capable" class representative entails a two-step process. First, the PSLRA sets forth a rebuttable presumption that "the most adequate plaintiff" is "the person or group of persons" who or that (a) has either filed the complaint or made a motion for appointment as lead plaintiff, (b) has "the largest financial interest in the relief sought by the class," and (c) "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). In deciding which proposed lead plaintiff has "the largest financial interest in the relief sought by the class," courts consider four factors: "(i) the gross number of shares purchased; (ii) the net number of shares purchased; (iii) the net funds spent; and (iv) the net loss." In re McDermott Int'l, 2009 WL 579502, at *2; see also In re Initial Pub. Offering Sec. Litig., 214 F.R.D. 117, 121 (S.D.N.Y. 2002).

As for the requirements of Rule 23, at this stage a proposed lead plaintiff need only make a "preliminary showing" that it will satisfy the typicality and adequacy requirements of Rule 23. Kaplan, 240 F.R.D. at 94; In re Initial Pub. Offering, 214 F.R.D. at 121.

Second, other members of the purported class may try to rebut the statutory presumption by showing that the presumptive lead plaintiff will not fairly and adequately protect the interests of the class or is incapable of adequately representing the class because of "unique defenses." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

The Court has the discretion to appoint more than one lead plaintiff and can aggregate the losses suffered by the members of a group of investors. See Varghese v. China Shenghuo Pharm. Holdings, Inc., 589 F. Supp. 2d 388, 391-92 (S.D.N.Y. 2008) (discussing when courts have permitted group of investors to be appointed lead plaintiff).

2. Application

a. Presumptive Lead Plaintiff

The following putative class members have timely moved for appointment as lead plaintiff:

-- The California Public Employees' Retirement System and the California State Teachers' Retirement System (together, the "California Funds"); they are represented by Grant & Eisenhofer PA;

-- The Central States, Southeast and Southwest Areas Pension Fund and the West Virginia Investment Management Board (together, the "Institutional Investor Group"); they are represented by Coughlin Stoia Geller Rudman & Robbins;

-- The State Teachers Retirement System of Ohio, the Ohio Public Employees Retirement System, the Teachers Retirement System of Texas, Stichting Pensioenfonds Zorg en Wilzijn, represented by PGGM Vermogensbeheer B.V. and Fjarde AP-Fonden (together, the "Public Pension Funds"); they are represented by three law firms, Bernstein Litowitz Berger & Grossman LLP ("Bernstein Litowitz"), Kaplan Fox & Kilsheimer LLP ("Kaplan Fox"), and Barroway Topaz Kessler Meltzer & Check LLP ("Barroway Topaz"); and

-- Finger Interests Number One, Ltd. ("Finger Interests"), represented by Susman Godfrey LLP.

Of the lead plaintiff movants, the Public Pension Funds have the largest financial interest. Their interest is certainly greatest under the four objective factors commonly used by courts: gross number of shares purchased, net number of shares purchased, net funds spent, and net loss. The Public Pension Funds purchased a gross number of 20,734,391.75 BofA shares and a net number of 15,051,110.99 shares from July 21, 2008 to January 20, 2009, the longest class period identified. (See Fox Decl. Exs. F, G, H, I, J). They spent \$259,745,374 and claim losses of approximately \$273.5 million under the first-in, first-out ("FIFO") calculation method and \$222.7 million under the last-in, first-out ("LIFO") calculation method. (Id.). The movants with the next-highest number of shares purchased are the California Funds, who purchased a gross number of 18,103,449 shares and a net number of 9,330,506 shares during the Class Period. (See Levine Decl. Exs. B, C, D, E). The California Funds' expenditures and losses are also smaller than the Public Pension Funds; they spent \$149,273,141 and claim an approximately \$260 million FIFO loss and an approximately \$98.1 million LIFO loss.⁶ (Id.).

In addition, the Public Pension Funds held around 34.4 million shares of BofA stock as of the October 10, 2008 record

⁶ The numbers are approximate as the California Funds reference different FIFO loss figures in their motion papers, all in the \$260-269 million range.

date, and they held 31 million shares eligible to be voted on the merger. (Supp. Fox Decl. Ex. A). The number of shares held is another factor that may be considered in gauging the movants' financial interest in the Section 14(a) claims. See Zucker v. Zoran Corp., No. 06 Civ. 4843 (WHA), 2006 WL 3591156 at *3 (N.D. Cal. Dec. 11, 2006). Although the California Funds note that they held approximately four million more shares of BofA common stock as of the record date (Cal. Funds Reply at 7), the Public Pension Funds' holdings were still substantial and support the determination that they have the largest financial interest in the litigation. Finger Interests, which seeks appointment as a niche lead plaintiff for the Section 14(a) plaintiffs only, owned only 1,064,711 BofA shares as of the record date.

At this stage of the litigation, the Public Pension Funds also "satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure," 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), as they have made a preliminary showing that they can meet the adequacy and typicality requirements of Rule 23. Their claims "arise[] from the same course of events" and they make "similar legal arguments to prove the defendant[s'] liability" as the other putative class members. In re Bear Stearns, 2009 WL 50132, at *8 (defining standard for typicality). Like other putative members of the class, the Public Pension Funds were entitled to vote on the merger between BofA and Merrill Lynch, and they had purchased or otherwise acquired BofA securities at prices allegedly inflated by defendants' materially false and misleading

statements and/or omissions. As a result their claims are typical in that they allege material misstatements and/or omissions made by defendants related to the merger, and they share an interest in establishing defendants' liability and achieving the maximum amount of recovery. See also In re Drexel Burnham Lambert Group, 960 F.2d 285, 291 (2d Cir. 1992) (the availability of different sources of recovery for class members does not destroy typicality); In re Bear Stearns, 2009 WL 50132, at *8 (some factual differences will not destroy typicality "as similarity of legal theory may control even in the face of differences of fact").

The Public Pension Funds also satisfy the adequacy requirement, as they have the greatest financial interest in the outcome of the case, their interests appear to be otherwise aligned with those of the putative class, and they have retained competent and experienced counsel. See Kaplan, 240 F.R.D. at 94 ("The adequacy requirement is satisfied where: (1) class counsel is qualified, experienced, and generally able to conduct the litigation; (2) there is no conflict between the proposed lead plaintiff and the members of the class; and (3) the proposed lead plaintiff has a sufficient interest in the outcome of the case to ensure vigorous advocacy."). Moreover, the group is comprised of large public pension funds in the United States and Europe; they are thus the type of sophisticated institutional investors envisioned by Congress in the enactment of the PSLRA. See Ferrari v. Impath, Inc., No. 03 Civ. 5667 (DAB), 2004 WL 1637053, at *3 (S.D.N.Y. July 20, 2004).

The California Funds and the Institutional Investors Fund argue that the Public Pension Funds are not a proper group of plaintiffs, claiming that the group is a lawyer-driven creation assembled to establish the largest financial interest in the litigation. I disagree. The Public Pension Funds have shown that they are able to "function cohesively and to effectively manage the litigation apart from their lawyers." Varghese, 589 F. Supp. 2d at 392; see also Hevesi v. Citigroup Inc., 366 F.3d 70, 83 n.13 (2d Cir. 2003) ("[T]he role of the lead plaintiff is to empower investors so that they -- not their lawyers -- exercise primary control over private securities litigation."). They have submitted declarations demonstrating cooperative efforts among the funds. (See Fox Decl. Ex. L; Supp. Fox Decl. Ex. A). Representatives from the different funds have discussed their decision to act jointly in the case and have made plans for joint oversight over the litigation and joint supervision of counsel, including implementing protocols for regular communication among members and with counsel. (Id.). The funds also each have internal personnel to represent them in the group and have met in person and on conference calls. (Id.). Such demonstrated cooperation among plaintiffs, particularly plaintiffs that are sophisticated institutional investors, satisfies concerns about designating groups as lead plaintiffs that are in fact dominated by counsel. Cf. In re McDermott Int'l, 2009 WL 579502, at *5 (rejecting proposal to appoint co-lead plaintiffs because plaintiffs had not "provided the Court

with any evidence of their pre-litigation relationship, their past cooperation, or any plans for future cooperation"); In re Tarragon Corp. Sec. Litig., No. 07 Civ. 7972 (PKC), 2007 WL 4302732, at **1-2 (S.D.N.Y. Dec. 6, 2007) (rejecting groups because there was "no showing that the members of either 'group' have, in fact, functioned as a group"). Although the members of the Public Pension Funds may not have functioned as a group in the past, for purposes of this litigation, it is clear they have functioned as a group and intend to continue to do so.

Groups of plaintiffs are specifically permitted by the PLSRA to be appointed lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(i) (courts "shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members") (emphasis added). Because they have established their ability to act independent of counsel, the Public Pension Funds are a proper group and are presumptive lead plaintiffs.

b. Rebutting the Presumption

The statutory presumption in favor of the Public Pension Funds is not rebutted. None of the other movants for appointment as lead plaintiff have shown that the Public Pension Funds will not fairly and adequately protect the interests of the class or that they, because of "unique defenses," are incapable of adequately representing the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

Finger Interests argues that the Public Pension Funds and the other pension fund movants cannot adequately represent the Section 14(a) shareholder class because they are former Merrill Lynch shareholders who benefitted from the merger. It claims that the relief sought by pre-existing BofA shareholders under Section 14(a) directly conflicts with the interests of the Public Pension Fund and other members of the Section 10(b) class because of their Merrill Lynch holdings. (Finger Interests Opp'n at 3-11).

Finger Interests' arguments are unavailing. At this early point in the litigation, its claim that an actual conflict exists between plaintiffs in the putative Section 10(b) and Section 14(a) classes remains speculative and premature. While the Public Pension Funds held shares in both BofA and Merrill Lynch prior to the merger, their pre-existing BofA shares were substantial -- nearly 35 million. By contrast, they held only around 8.8 million Merrill Lynch shares. (Public Pension Funds Reply Mem. at 5). The Public Pension Funds therefore have an enormous economic motivation to seek recovery on behalf of pre-existing BofA shareholders on both the Section 10(b) and Section 14(a) claims. See In re Elan Corp. Sec. Litig., No. 02 Civ. 865 (WKFM), 2002 WL 31720410, at **3-4 (S.D.N.Y. Dec. 3, 2002) (rejecting motion for separate lead plaintiff to be appointed where no clear conflict of interest existed). The suggestion that the Public Pension Funds, because of their Merrill Lynch holdings, would have wanted the merger to go through regardless

of the harm that it might cause to their pre-existing BofA investments is speculative. No actual conflict of interest has been shown that would rebut the statutory presumption in favor of appointing the Public Pension Funds as lead plaintiff.

Finger Interests' proposed appointment as niche plaintiff for the Section 14(a) class would add to the expense of the litigation, to the detriment of BofA shareholders, and is not warranted under the circumstances. "[A] wide ranging analysis under Rule 23 is not appropriate at this stage of the litigation and should be left for consideration of a motion for class certification." In Re Bear Stearns, 2009 WL 50132, at *8 (Jan. 5, 2009) (alterations in the original) (citation and internal quotation marks omitted). Whether subclasses are necessary to advance the interests of pre-existing BofA shareholders who did not hold Merrill Lynch stock may be revisited then. See In re Elan Corp., 2002 WL 31720410, at *4; see also Constance Sczesny Trust v. KPMG LLP, 223 F.R.D. 319, 325 (S.D.N.Y. 2004) (though lead plaintiff may face unique defenses, interests of different class members "not sufficiently differentiated to require the appointment of a 'niche' lead plaintiff at this time").

c. Lead Plaintiff's Selection of Counsel

The PSLRA provides that the "most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class." 15 U.S.C. § 87u-4(a)(3)(B)(iv). The Public Pension Funds have selected the law firms of Kaplan Fox, Bernstein Litowitz, and Barroway Topaz to serve as lead

counsel. All three firms are highly experienced in prosecuting securities class actions. Additionally, the firms indicate that they have implemented measures to limit legal fees and costs, including dividing labor among counsel for the sake of efficiency, requiring approval for significant expenses, and negotiating a competitive fee agreement with plaintiffs. (Fox Decl. Ex. L; Supp. Fox Decl. Ex. A). Accordingly, the Public Pension Funds' choice of counsel is approved.

C. Interim Lead Counsel In The Derivative and ERISA Actions

1. Applicable Law

In complex cases, courts may appoint a plaintiff leadership structure to coordinate the prosecution of the litigation. Fed. R. Civ. P. 23(g)(3) provides that courts "may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Interim class counsel's role is to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). While not statutorily required, the appointment of interim class counsel may be helpful in "clarify[ing] responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement." Federal Judicial Center, Manual For Complex Litigation § 21.11 (4th ed. 2004); see also MacAlister v. Guterma, 263 F.2d 65, 68-69 (2d Cir. 1958) (benefits of appointing lead counsel include eliminating duplication and repetition).

In appointing interim class counsel, courts must appoint the applicant "best able to represent the interests of the class." Fed. R. Civ. P. 23(g)(2). Courts consider:

- (i) the work counsel has done in identifying or investigating potential claims in the action;
- (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- (iii) counsel's knowledge of the applicable law; and
- (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). They may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). These include: "(1) the quality of the pleadings; (2) the vigorousness of the prosecution of the lawsuits; and (3) the capabilities of counsel," In re Comverse Tech., Inc. Derivative Litig., No. 06 Civ. 1849 (NGG) (RER), 2006 WL 3761986, at **2-3 (S.D.N.Y. Sept. 22, 2006), as well as whether counsel "are qualified and responsible, . . . [whether] they will fairly and adequately represent all of the parties on their side, and . . . [whether] their charges will be reasonable." In re Bear Stearns, 2009 WL 50132, at *11 (quoting Manual For Complex Litigation § 10.22).

2. Application

a. Derivative Actions

The following putative plaintiffs have filed motions seeking appointment as lead derivative plaintiff and to have their counsel appointed lead counsel:

-- West Palm Beach Police Pension Fund, the Firemen's and Policemen's Pension and Relief Fund of the City of Tuscaloosa, and the Westmoreland County Employee Retirement System (together, the "Pension Funds") move for appointment as lead plaintiff and to have their counsel Scott + Scott LLP ("Scott + Scott") appointed as lead counsel; they are joined by plaintiff James F. Lehmann;

-- Edward Thomas Smith and Martin Siegel move for the appointment of Weiss & Lurie and The Brualdi Law Firm, P.C. ("The Brualdi Law Firm") as co-lead counsel; and

-- Louisiana Municipal Police Employees Retirement System ("LMPERS") and Hollywood Police Officers' Retirement System (together, the "Institutional Group") move for appointment as co-lead plaintiffs and to have their counsel KSF and Saxena White appointed as co-lead counsel.

After review of the factors and taking other considerations into account, I appoint the Institutional Group interim lead plaintiff and KSF and Saxena White interim co-lead counsel. As an initial matter, I note that all of the above law firms have demonstrated that they are experienced and qualified to serve as interim lead counsel. Each has experience handling complex litigation, including shareholder derivative suits, and has knowledge of the applicable law. The pleadings are also well-drafted and each firm has shown itself to be vigorous in its prosecution. My decision is based on the following.

First, the Institutional Group is comprised of two institutional investors who are well-suited to acting on behalf of the putative class prior to certification. LMPERS is an experienced and active institutional litigant; it moreover has experience as a plaintiff in derivative actions on behalf of BofA and Merrill Lynch. See Louisiana Mun. Police Employees Ret. Sys. v. Thain et al., No. 08 Civ. 7618 (PKC) (S.D.N.Y.); Louisiana Mun. Police Employees Ret. Sys. v. Lewis et al., No. 08 Civ. 4561 (N.D. Calif.). Although the Pension Funds note that both actions were voluntarily dismissed after relatively little activity had occurred, this does not detract from LMPERS' experience and expertise.

Second, Saxena White has been involved as co-lead counsel in derivative litigation on behalf of Merrill Lynch. See In re Merrill Lynch & Co., Inc. Sec., Derivative & ERISA Litig., Master File No. 07 Civ. 9633 (JSR) (DFE) (S.D.N.Y.). Though the actions are not related, there may well be overlap enhancing Saxena White's capabilities to act as an effective representative for the class in this action.

Finally, a co-lead counsel structure is appropriate, as Saxena White and KSF will be able to share resources and expertise for the litigation of the case during the pre-certification stage. Contrary to the Pension Funds' assertion, there is no preference for only one law firm to be appointed lead counsel in cases such as the current action, with many different defendants and complicated issues. Rather, appointment of multiple counsel is routine and widely accepted.

The other movants advance different arguments in favor of their own appointment and against the appointment of KFS and Saxena White and the Institutional Group. In general, however, the different movants' criticism of each others' claims and pleadings is unconvincing. All of the derivative complaints include roughly the same allegations; each also contains unique factual allegations, legal theories, and claims. I need not determine which complaints are superior to the others. Many, if not all, deficiencies in the different complaints may be cured when the Institutional Group files a consolidated derivative complaint, and differences among the complaints can also be addressed at that time.

Accordingly, the Institutional Group is appointed interim lead plaintiff in the derivative actions and KSF and Saxena White are appointed interim class counsel.

b. ERISA Actions

The following plaintiffs have filed motions seeking appointment as lead ERISA plaintiff and/or lead counsel:

- Vernon Dailey, Rhonda Wilson, and Mark Adams move to have Harwood Feffer, Squitieri & Fearon, and Hagens Berman appointed interim co-lead counsel;

- Margaret Stricker and Michael Andrews move for Andrews to be appointed lead plaintiff and to have Johnson Bottini, LLP appointed as interim class counsel with Murray, Frank & Sailer LLP as liaison counsel;

- Leo Gilliam moves for appointment as interim lead plaintiff with Stanley Luboff and Robert E. Gaynor and to have Stull, Stull & Brody appointed as interim lead counsel;

- Alma Alvarez and Kelly Weigel move for appointment as interim lead plaintiff and to have Bailey & Glasser LLP and Schneider Wallace Cottrell Brayton Konecky LLP appointed as interim co-lead counsel; and

- Judy Calibuso moves for appointment as lead plaintiff and to have Lewis, Feinberg, Lee, Renaker & Jackson, P.C. ("Lewis Feinberg") and Lieff, Cabraser, Heimann & Bernstein, LLP ("Lieff Cabraser") appointed interim co-lead counsel, with Lieff Cabraser appointed as liaison counsel and Ferguson, Stein, Chambers, Gresham & Sumter, P.A. ("Ferguson Stein") and Outten & Golden, LLP ("Outten & Golden") appointed as additional counsel.

After review of the factors and taking other considerations into account, I appoint Harwood Feffer, Squitieri & Fearon, and Hagens Berman interim co-lead counsel, with no designation of interim lead plaintiff. Here, where all of the movants for interim lead plaintiff are individual Plan participants -- not active, experienced institutional litigants like LMPERS in the derivative actions -- the rationale for appointing an interim lead plaintiff is lacking. Appointing interim class counsel is sufficient to protect the interests of the class during the pre-certification period. Accordingly, I focus on the candidates for lead and co-lead class counsel.

As with the derivative actions, all of the law firms in the ERISA actions have demonstrated their experience and qualifications to serve as interim lead counsel. My decision is based on the following.

First, Harwood Feffer, Squitieri & Fearon, and Hagens Berman brought three of the eight ERISA claims. In addition to Dailey, Wilson, and Adams, plaintiff Lesley Wright also concurs in the proposed leadership structure, creating consensus among plaintiffs in four of the eight ERISA actions filed. (Berman, Harwood, Squitieri Joint Decl. ¶ 3).

Second, underscoring their ability to coordinate their activities and seek consensus, Harwood Feffer, Squitieri & Fearon, and Hagens Berman have already taken meaningful steps in the litigation to advance the interests of the putative class, including filing the first three complaints on behalf of Plan participants, obtaining Plan documents and requesting additional documents from BofA, interviewing and surveying class members, consulting with a financial expert about potential damages, communicating with defendants' counsel, and setting up a website with a description of the case and an invitation to Plan participants to register their interest in the case. (Id. ¶¶ 12-16). These actions not only demonstrate the firms' expertise, but also their ability to work cooperatively.

Last, both Harwood Feffer and Squitieri & Fearon are based in New York. Hagens Berman is based in Seattle but has attorneys in New York, as well.

Other movants' arguments against the appointment of the Harwood Feffer group are unavailing. The involvement of three law firms is appropriate for a class action of this complexity. Additionally, the conflicts of interest identified by the other movants remain speculative and hypothetical at this point. Finally, although the different movants argue against the quality of the Dailey, Adams, and Wilson complaints, the pleadings are well-drafted and, as discussed above with the derivative actions, any differences among the complaints may be addressed with the filing of a consolidated complaint.

Accordingly, Harwood Feffer, Squitieri & Fearon, and Hagens Berman are appointed interim co-lead counsel.

CONCLUSION

For the reasons set forth above, the securities, derivative, and ERISA actions are each separately consolidated. Future cases raising common questions of law and fact filed in this Court or transferred to this Court will also be consolidated into the appropriate consolidated case.

The Public Pension Fund group is appointed lead plaintiff in the securities actions, and its choice for lead counsel is approved. The Institutional Group is appointed interim lead plaintiff in the derivative actions and KSF and Saxena White are appointed interim co-lead counsel. Harwood Feffer, Squitieri & Fearon, and Hagens Berman are appointed interim co-lead counsel in the ERISA actions.

Lead counsel for each set of plaintiffs shall submit a proposed consolidation order on notice within ten days hereof. The parties shall meet and confer within twenty days hereof to agree upon an initial case management order for submission to the Court, for its approval. They shall appear at a pre-trial conference on July 29, 2009, at 10 a.m. in Courtroom 11A.

SO ORDERED.

Dated: New York, New York
June 30, 2009



DENNY CHIN
United States District Judge

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